Opportunity Homes, Inc. *and* Service Employees International Union, Local 627, AFL–CIO. Cases 8–CA–24610 and 8–CA–25211

December 30, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND BROWNING

On December 29, 1993, Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. The Respondent filed exceptions, a brief in support of exceptions, a reply brief to the answering brief of the General Counsel, and an answering brief to the cross-exception of the General Counsel. The General Counsel filed a cross-exception and an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions and to adopt[3] the recommended Order as modified.

1. The judge found that the Respondent violated Section 8(a)(3) of the Act by terminating its licensed practical nurses (LPNs). The Respondent excepts to this finding and moves to withdraw its stipulation that the LPNs are employees within the scope of the Act, to amend its answer concerning the supervisory status of the LPNs, and to reopen the record to admit evidence concerning the supervisory status of the LPNs. In its motion, the Respondent contends that it should be permitted to raise a new defense, i.e., that its LPNs are supervisors, because the Supreme Court, in *NLRB v. Health Care & Retirement Corp*., 146 LRRM 2321 (May 23, 1994), articulated a new standard for determining supervisory status in the health care industry.

We find no merit to the Respondent's contention and accordingly deny the motion. The Respondent chose not to raise the supervisory issue before the judge, and indeed stipulated that its LPNs were employees, even though the Sixth Circuit—where our decision in this case could be appealed—had previously disagreed with the Board's standard for determining supervisory status in the health care industry. See *Health Care & Retirement Corp. v. NLRB*, 987 F.2d 1256 (6th Cir. 1993), and *Beverly California Corp. v. NLRB*, 970 F.2d 1548 (6th Cir. 1992). Thus, by stipulating that its LPNs are employees under the Act, the Respondent declined to preserve the supervisory issue for appeal and, in effect, conceded that its LPNs are not supervisors under any applicable standard.[4]

2. The Respondent has also moved for leave to introduce evidence concerning bargaining that occurred subsequent to the judge's decision, and has further moved for leave to introduce evidence concerning an inspection of the Respondent's facility subsequent to the judge's decision. We deny these motions on the ground that, in both instances, the evidence the Respondent seeks to introduce is not relevant to whether the Respondent engaged in the unfair labor practices the judge found.[5] We leave to compliance the issue of whether evidence concerning bargaining that occurred subsequent to the judge's decision is relevant to the issue of mitigation of the Respondent's remedial obligations.[6]

3. The Respondent excepts to the judge's finding that the Respondent violated Section 8(a)(3) of the Act by terminating employee Donna Yeager for her union activities. The Respondent contends that it lawfully terminated Yeager for insubordination. We find no merit to this contention. In agreeing with the judge, we emphasize that, in deciding to terminate, the Respondent admitted it relied on an earlier suspension of Yeager, which the judge found was an unfair labor practice.

[1] The Respondent asserts in its exceptions that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that these contentions are without merit.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We correct, in sec. III,G of the judge's decision, the judge's inadvertent reference to Director of Nursing Richardson's interrogation of employee Milhoan as Milhoan's interrogation by Fithian.

The judge found that the Respondent violated both Sec. 8(a)(3) and (4) of the Act by harassing employee Gayle Milhoan. We find it unnecessary to pass on the question of whether the harassment violated Sec. 8(a)(4) because the finding of such a violation would not affect the Order, as recommended by the judge.

[3] We find no merit to the Respondent's contention that its prohibition of union pins was legitimately enacted in response to safety concerns, because Administrator Jones admittedly continued to wear a decorative pin in the Respondent's facility.

[4] The General Counsel filed an opposition to the Respondent's motion and moved to strike the affidavits the Respondent attached to the motion. Although we agree with the General Counsel that the Respondent cannot now submit additional evidence by way of affidavits, we find it unnecessary to strike the attachments in view of our disposition of the Respondent's motion. Accordingly, the General Counsel's motion is also denied.

[5] It is well established that the Board need not reopen the record unless the moving party has demonstrated that the new evidence would require a different result. *NLRB v. Johnson's Industrial Caterers*, 478 F.2d 1208, 1209 (6th Cir. 1973); Sec. 102.48(d)(1) of the Board's Rules.

[6] The General Counsel filed oppositions to the Respondent's motions and also filed motions to strike. We agree with the General Counsel that the Respondent's answering brief should not have referenced to an affidavit not in evidence. We strike that reference, but deny the General Counsel's motions in all other respects.

The Respondent has not shown that Yeager would have been terminated absent its consideration of this prior incident.

4. We shall modify the judge's recommended Order to include the Board's traditional make-whole language for any loss of wages and benefits resulting from the Respondent's violations of Section 8(a)(5) of the Act, and to correct the language concerning the Respondent's unlawful surveillance to correspond with the judge's conclusions of law. In addition, because of the Respondent's widespread misconduct, demonstrating a general disregard for the employees' fundamental rights, we find it necessary to issue a broad order, requiring the Respondent to cease and desist from infringing in any other manner with rights guaranteed employees by Section 7 of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979).[7]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Opportunity Homes, Inc., Lisbon, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

''(a) Interfering with, restraining, or coercing its employees in the exercise of rights guaranteed in Section 7 of the Act by interrogating an employee about union support or union activities, by engaging in unlawful surveillance, by threatening to enforce policy and work rules, and threatening unspecified reprisal or discharge because of, or if employees engaged in, union or protected concerted activities.''

2. Substitute the following for paragraph 1(f).

''(f) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed them by Section 7 of the Act.''

3. Insert the following as paragraph 2(d) and reletter the subsequent paragraphs.

''(d) Make whole unit employees for any loss of earnings and other benefits suffered as a result of the unilateral changes, in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).''

4. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act by interrogating employees about their union support or union activities, by engaging in unlawful surveillance of employees, by threatening to enforce policy and work rules, and threatening unspecified reprisal or discharge because of, or if employees engaged in, union or protected concerted activities.

WE WILL NOT interfere with, restrain or coerce employees, or discriminate against employees because they joined or supported a union or unilaterally and without bargaining affect changes in terms and conditions of employment by discontinuing our early check distribution policy; by removing the pay telephone; by discontinuing nurses access to the copy machine; by changing our policy regarding signing of in-service memos; by maintaining a list of employees who decline to work as fill-ins; by discontinuing our cash advance policy; by prohibiting employees from wearing pins; by requiring nurses to find their own replacements; by requiring nurses to provide a doctor's excuse for any absence; by changing our practice regarding overtime for nurses; by creating and thereafter failing to post the position of habilitation specialist; by reducing the hourly rate of pay; and by eliminating the position of physical therapy aide.

WE WILL NOT suspend, terminate, issue disciplinary warnings, harass, or otherwise discriminate against any employee because of, or in retaliation for, engaging in union activities or other protected concerted activity.

WE WILL NOT unilaterally withdraw recognition of Service Employees International Union, Local 627,

[7] The General Counsel excepts to the judge's failure to provide, in the alternative, for a bargaining order in accordance with *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). We find it unnecessary to pass on the issue his exception raises. Under par. 2(c) of the judge's recommended Order, which we adopt, the Respondent is obligated to bargain in order to remedy its withdrawal of recognition and refusal to bargain violation. Therefore, issuing a *Gissel* bargaining order would not affect the remedy.

We do not rely on *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962), cited by the judge in the remedy section of his decision, because the instant case does not involve a certified union.

AFL–CIO, and fail and refuse to bargain with the Union as the exclusive bargaining agent of our employees in the following appropriate unit:

> All full time and regular part-time licensed practical nurses, habilitation, activity, therapy, and psyche aides, dietary, social service, housekeeping and maintenance employees, and seamstresses employed at our Lisbon, Ohio facility, but excluding the administrator, program director, director of nursing, dietary manager, social services director, registered nurses and all professional employees, guards and supervisors as defined in the Act.

WE WILL NOT unilaterally implement changes in terms and conditions of employment without first notifying or bargaining in good faith with the Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL offer Kathy Byers, Carol Redmond, Blaine Ritchie, and Jim Tharp immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them, as well as Eleanor Bilsky, Brad Martin, Gayle Milhoan, Lorena Howell, and Donna Yeager, whole for the losses they incurred as a result of the discrimination against them.

WE WILL expunge from our files any reference to the warnings, suspensions, and discharges of these employees as well as of Linda Joy and notify them in writing that this has been done and that evidence of the unlawful discharge and warning will not be used as a basis for future personnel actions against them.

WE WILL on request, rescind all or part of the unilaterally made changes in terms and conditions of employment, retroactively restore preexisting terms and conditions of employment, and bargain in good faith with the Union as the exclusive bargaining agent of employees in the above appropriate unit of employees with respect to their wages, hours, and other terms and conditions of employment and embody any understanding reached in a signed agreement.

WE WILL make whole unit employees, with interest, for any loss of earnings and other benefits suffered as a result of the unilaterally made changes.

OPPORTUNITY HOMES, INC.

Paul C. Lund, Esq., for the General Counsel.
Roger W. Strassburg Jr., Esq., of Akron, Ohio, for the Respondent.
Robert S. Moore, Esq., of Youngstown, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in East Liverpool, Ohio, February 2–5, March 9–12, and April 7 and 8, 1993. Subsequent to requested extensions in the filing date, briefs were filed by General Counsel and the Respondent. The proceeding is based on a charge filed May 26, 1992,[1] as amended, by Service Employees International Union, Local 627, AFL–CIO. After the first week of hearing Case 8–CA–25211 (based on a charge filed February 9, 1993, by the same party), was consolidated with the title case in response to a motion by the General Counsel filed March 2, 1993.

The Regional Director's complaint dated September 15, 1992, alleges that Respondent violated Section 8(a)(1), (3), (4), and (5) of the National Labor Relations Act by unlawfully withdrawing recognition from the Union; by threatening to enforce its policy and work rules, engaging in unlawful surveillance, interrogating employees, threatening employees with unspecified reprisals and threatening employees with discharge because they engaged and/or if they engaged in union or protected concerted activities; by issuing disciplinary warnings to employees including Lorena Howell, Linda K. Joy, and Blaine Ritchie; by suspending in May and thereafter terminating its entire nursing department in June, including Kathy Byers, Lorena Howell, Gayle Milhoan, and Carol Redmond; by terminating the employment of Blaine Ritchie and by suspending on May 29, and thereafter terminating the employment of Donna Yeager on June 10, all because of their union or protected concerted activities; by engaging in an unlawful course of conduct directed at Gayle Milhoan after her return to work in October, and by unilaterally, without bargaining with the Union, changing wages, hours, and working conditions, and by conduct including discountinuing its early check distribution policy; removing the pay telephone; discontinuing nurses' access to the copy machine; changing the starting times and hours or work for various employees; changing its policy regarding signing ''in-service'' memos; maintaining lists of employees who declined to work as fill-ins; discontinuing its cash advance policy; prohibiting employees from wearing pins; requiring nurses to find their own replacements; requiring nurses to provide a doctor's excuse for any absence; changing its practice regarding overtime pay for nurses; creating and thereafter failing to post the position of habilitation specialist; changing its policy and removing PRNs from the LPN on-call list; reducing the hourly rate of pay for Brad Martin; and by eliminating the position of PT aide occupied by John Tharp.

By motion dated July 29, 1993, the Respondent seeks to reopen the hearing (a related motion to correct the case number is hereby granted), to receive the results of a survey of theirs by the Ohio Department of Health and Plan of Correction dated June 1993. In response, the General Counsel points out that the survey, which was completed on June 11, 1993, is more than 14 months from the previous survey and over a year from the time the nurses were suspended. Under

[1] All following dates will be in 1992 unless otherwise indicated.

these circumstances I find that it has no clear relevance to any of the allegations in the involved cases and, accordingly, the motion is denied.

On a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation engaged in providing care and therapy for disabled or retarded residents of its Lisbon, Ohio facility. Annually, in the course and conduct of its operations, Respondent received $250,000 in gross revenues from state and Federal sources and purchases and receives goods valued in excess of $5000 directly from points outside the State of Ohio. It admits that at all times material it has been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Respondent's facility provides full-time residential care and therapy for approximately 22 mentally and/or physically handicapped residents who can function independently only on very limited bases. The home has a staff of 44 (unit) employees (as of January 24), which is supplemented by both temporary and part-time employees. Employees were supervised by Director of Nursing Judy Manning, Dietary Manager Terry Buckly, Habitation Coordinator Kathryn Fristik, and Program Director (and, in effect, assistant administrator) Richard Fithian, all under the overall day to day management of Administrator Mary Jane Jones. Respondent's operations receive funds from governmental sources and, in turn, are regulated by several state agencies, including the Ohio Department of Health (ODH), the Ohio Department of Human Services (ODHS), and the Ohio Department of Mental Retardation and Developmental Disabilities (ODMR).

It was stipulated that the following described employees of Respondent, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time licensed practical nurses, habilitation, activity, therapy, and psyche aides, dietary, social service, housekeeping and maintenance employees, and seamstresses employed at the Employer's Lisbon, Ohio facility, but excluding the administrator, program director, director of nursing, dietary manager, social services director, registered nurses and all professional employees, guards and supervisors as defined in the Act.

This unit was recognized formally by Respondent on October 12, 1992, following a hiatus of over 9 months after its alleged initial recognition of the Union on January 24, and the intervening mass suspension and subsequent firing of all of its licensed practical nurses (LPNs) on May 18, and the occurrence of a number of other events, set forth in more detail in the discussion, below, which precipitated the charges and allegations in the complaint.

In October 1991, Donna Yeager a member of the direct care staff who then was acting as an assistant supervisor, was given a 5-day suspension for apparently trivial reasons (which she considered to be unjustified), and she thereafter discussed the possibility of seeking a union to represent the employees of the Respondent with LPN Kathy Byers. Byers then contacted the Union, set up meetings and then gave authorization cards to Yeager and Carol Redmond, another LPN, and all three then distributed the authorization cards among Respondent's employees.

On January 22, a meeting was held at the Lisbon City Hall at which Debra Timko, the organizer for the Union, announced that the Union was going public with its support, that they were going to seek recognition, and would present a signed petition to the Respondent on January 24. Forty-one employees signed the petition, which stated: ''We the undersigned have organized a union with Local 627, S.E.I.U. We demand that you recognized our Union. We know what our rights are and we will do whatever it takes to win recognition or our Union and the respect we deserve.''

As noted, there were 44 employees in the unit described above and 42 had signed valid authorization cards as of January 24. At noon on Friday, January 24, Timko, closely accompanied by Redmond and Byers and approximately 40 employees and family members, presented the petition to Administrator Jones in a hallway at Respondent's facility.

Timko gave Jones a letter and the unfolded petition and demanded that Respondent recognize the Union as the bargaining representative of its employees. Jones reviewed the petition briefly[2] and responded that ''yes,'' she would recognize the Union as ''they had been thinking of starting a union for some time.'' Timko then inquired of Jones as to whether or not she understood that she was recognizing the Union and that they would begin bargaining in the near future. Jones acknowledged that she understood. Timko then told the group they had their Union, and they responded with a cheer.

In her testimony Jones disputed or embellished on this description of events, however, as discussed in footnote 2 and below, I do not find her testimony credible in these instances.

Jones further testified that during the afternoon she felt that there was a change in attitude with a lot of employees (for example, unidentified persons were avoiding eye contact or smirking), and that a feeling of anger built up then and during the weekend and that she ''just got real upset.'' Inexplicitly, she asserts she didn't open the envelop from the Union until 4 p.m. and that she then called Respondent's legal counsel. She was instructed ''just don't sign anything'' and that the board of directors would be contacted and a meeting set up to discuss the situation.

On Monday morning an article appeared in the local paper. Jones testified she read the article but she could not recall what the article said. When shown her affidavit, she recalled that it indicated that Respondent was now unionized.

[2] Employee Linda Joy took a picture (G.C. Exh. 5) of Timko presenting the petition to Jones. While Jones denied that the petition was open, it is clear from the testimony of those in attendance and from the picture, that the petition was open and unfolded when presented to Jones.

She also said that she was contacted by the board of directors shortly after each had seen the article and that they met thereafter.

Also on Monday, Jones posted a notice to the employees entitled ''Request for Unionization'' in which she bitterly expressed her disappointment with the employees and, among other things stated that:

> anything I have to say to the employees will come via an official memo or other similar form. Legal counsel has advised me to close my open door policy. I will address employee problems, but only through a third person, the union representative. . . . We will now be forced to follow the policy manual to the letter.

Otherwise, the notice makes no reference to any election.

Also, on January 27, Union Representative Timko sent a letter to Jones which acknowledged her pleasure over Jones' recognition of the Union on Friday and requesting and suggesting negotiation dates.

The newspaper article reported that the Union had been recognized on Friday. Jones testified that she really had thought they had merely requested to form a union and that she merely acknowledged that request rather than actually recognizing the Union itself. Otherwise, however, Jones acknowledged that even after receiving a letter from the Union asking for bargaining dates, she never responded to the Union, never asked the newspaper to print a retraction, never told the Union to contact Respondent's legal counsel, and never posted another memo to Respondent's employees informing them that Respondent had not recognized the Union. She acknowledged receiving calls from Timko and agreed that she never returned them. Timko, however, testified that on one occasion, on February 4, she did talk to Jones, who indicated they were still preparing for negotiations.

On February 4, the Union posted a list of the negotiating committee at several locations in the facility. Jones denies that she saw it. Redmond testified that it was printed on red paper and one was observed on Assistant Administrator Fithian's desk. As pertinent, the list was headed by the name of Kathy Byers. It listed Redmond as alternate for the LPN's and included the names of Donna Yeager, Blaini Ritchie, Eleanor Bilsky, Linda Joy, Linda Ketchum, Vickie Howells, John Tharp, and Brad Martin, among others.

The Respondent otherwise admits that it did not bargain with the Union on any matters and did not begin any negotiations with the Union until it specifically acknowledged recognition in October 1992.

Jones testified that she spoke to the board members ''very briefly'' about the newspaper article, but said she saved a full discussion for a board meeting held on February 12. Meanwhile, within a few days after January 24, the locks were changed on the doors to Respondent's main offices, the pay telephone was removed and unlimited access to the copier by the LPNs was eliminated because of the change in locks. After January 24 Respondent also changed its policy in distributing checks whereby employees who worked the afternoon and evening shifts were no longer allowed to receive their checks early. Respondent also admitted that it discontinued its policy of allowing employees to receive cash advances on their checks which allowed employees to receive advances for hours worked 2 to 4 days early.

On January 23, activity aide Linda Joy, lost her programs for the month (copies of which were needed so that the facility could be reimbursed by the State). On January 30, she was given a written warning by Fithian, which stated that any repeat of lost documentation would result in her suspension and any further disciplinary problems within the next 90 days would result in progressive disciplinary procedures. Byers, at Joy's request, accompanied her to the disciplinary meeting, defended her and advised Joy not to sign the warning. After the meeting, Fithian told Joy in private that he could have brought the programs up on the computer but since the Union had been brought in, he had to follow procedure. Subsequently, Fithian himself was cited in a survey by the State (ODH) for missing plans and minutes, but he was never disciplined for this by the Respondent.

Milhoan testified that after January 24, management began to treat employees as if they were invisible, ''if you passed them in the hall they wouldn't speak,'' ''communications effectively ceased.'' Numerous other actions occurred, as discussed below, which are either alleged as violations of the employee's Section 7 rights or which otherwise tend to show management's animosity and disregard for its employees and the Union.

On February 12 Respondent's board of directors met and its notes indicate that a discussion was held about the unionization attempt. Notes from another board meeting held March 3, at which a labor relations attorney also was present, recognized the filing of union charges with the Labor Board, that a discussion was held on that subject, and that the board voted unanimously to not recognize the Union and ''to proceed with whatever measures that were necessary in this matter.''

On no occasion prior to October did Respondent's board of directors communicate to the Union any repudiation of Jones' actions on behalf of the Respondent. Also, several attempts by union member Byers and others to communicate with the board and some of its members were rebuffed.

On January 28, Redmond served as a witness to a writeup given to LPN Lorena Howell for an alleged medication report error that had occurred 2 months earlier, in November 1991. When Howell asked time to think about what had happened before signing the writeups, Nursing Supervisor Manning yelled at Howell that prior to the Union coming she would have just signed to all of her mistakes. Redmond objected to Fithian, who also was present, that Manning sees the medication orders just as the LPNs do and that if an order was missing (from the records) it was partially Manning's fault also. Manning responded by standing up and shaking the writeup in Howell's face and saying that she had to sign it then.

This type of confrontational tone by Manning persisted from that point on and Manning also regressed to a total hands-off approach regarding the supervision of her staff. Manning testified that she knew her four LPNs all supported the Union, that they had a big change in attitude after the petition was presented and that problems thereafter occurred. Manning issued no writeups for asserted refusals to follow orders and she held no meetings to help resolve problems because she said it was hard to do so when they don't communicate with you. She said she had a daily, short ''exchange of words'' with individuals but never spoke to them about problems. Manning also made generalized, blanket com-

plaints about the LPNs, such as alleging that when a nurse would call off, others were no longer willing to come in and work. She could not recall, however, if Redmond or Byers ever missed any assigned days by calling off (they had not).

Manning went on to testify that ''our communication had broken down'' and that ''they'' were not doing the kind of job and ''it'' was affecting the facility. She then was asked:

> Q. They refused to do it and this would have a direct impact on patient care; isn't that correct?
>
> A. Yes, it would.
>
> Q. And you never felt it necessary to confront them on that, even though this affected the patients?
>
> A. No, they were good nurses and they knew what kind of care was needed for the patients and they had provided that in the past.
>
> Q. So even though now it was your belief that they were not providing this care, you didn't feel it was your job to go and talk to them and tell them, hey, you've got to provide the appropriate patient care?
>
> A. They knew for years what appropriate patient care was, they knew. I didn't have to tell them what it was.
>
> Q. You never went and talked to them; isn't that correct?
>
> A. I am stating that orally I had mentioned things off and on to the nurses during whatever conversation we had during the day. If you are asking me if I sat them down at my table and said this is the way it is, no, I did not.

In April the facility was subject to an annual ''survey'' by the ODH and Jones indicated that she believed someone was trying to sabotage the survey but that she had no idea who and that she didn't know who was beginning to file charges with various state agencies.

Shortly after the state survey, Jones gave a speech to the employees and accused the LPNs of sabotaging the records, going behind her back, and betraying her. She further stated that a couple of people were leading the employees down the wrong path. By letter dated May 14, which was sent to between 10 and 15 local doctors, she stated that a group of employees were trying to bring a union in, and that their actions bordered on lawlessness. She wrote that these employees sent letters to families and guardians of the residents, issued false press releases, filed complaints with every state and Federal agency that regulates the Respondent; attempted to sabotage the recent state survey, and she characterized their actions as reprehensible. When questioned, she maintained that she had no idea who these employees were even though the employee's complaints and letters to guardians and family was signed by many employees, including the alleged discriminatees.

Although the facility received over 50 citations in the ODH survey, the LPNs were never shown the survey results and Manning admitted that she never discussed the citations with the nursing staff and said she never inquired about their conduct because she believed their actions were intentional. Jones testified that after she reviewed the citations she determined that the nursing staff was directly responsible for 35 percent of the citations, but admitted that her assessment was purely speculation.

Jones hired a ''quality assurance nurse'' to look into the nursing department and review the citations and audit all the nursing documents and charts in order to assess blame. Marilyn Robb, who had been Respondent's director of nursing prior to Manning, was hired for this purpose on May 4. By her own admission, Robb never interviewed or talked to any of the LPNs, never gave them the opportunity to explain any of their documentation and never talked to any of the doctors involved. Of the 22 residents, she eventually reviewed the charts of only 6 and it appears that she had only reviewed the documentation for 2 residents by May 18. She also testified that she made no recommendation that the LPNs should be suspended.

On May 18, the LPNs were notified to attend a mandatory meeting and on arriving were handed letters by Jones and told they all were suspended. Jones also said that the Ohio Department of Health was tired of their phone calls, and they were escorted off the premises. Redmond passed Vicki Howells and told her that they were suspended and Howells testified that immediately after their departure she observed Manning singing ''We did it, we did it, we got rid of them.''

In a letter dated May 23 submitted to the State by Respondent, Jones devoted three pages to a section entitled ''The Impact of Unionization,'' stating that union employees had decided to place pressure on the administration and that their tactics had a devastating effect on the facility, that the facility records had been sabotaged, and that the nursing department had been deliberately making errors. She also indicated that even though managers attempted to spend all available time working with the staff to improve active treatment and supervise nursing activities, the employees were not going to support management as ''the organizers used, and continue to use, every tactic possible to discredit the administration and Board of Directors.''

Jones further indicated that the nursing staff was placed on suspension and concluded by saying:

> All employees have been given the chance to make an informed decision. Any employee who does not support the program, complete their job responsibilities as assigned and make the resident the priority issue on their mind will be disciplined, up to termination. Up until last week, the management made an attempt to operate the program without repercussion from the National Labor Relations Board. Management has now made an informed decision of its own. There is nothing that the NLRB could do to us that could be anywhere as devastating as the residents losing their home.

After the LPNs were suspended they established a picket line. Robb continued her audit and orally gave her conclusions to Jones on approximately June 10. The handwritten report was then typed and given to Jones on June. The report states on the first page:

> The attached information is a compiled report of the nursing documentation including February through some of April and May. This report includes the most serious documentation errors made by the nurses as listed below and serves as the back up documentation needed to support their suspension from this facility and subsequent termination. This information applies to the following nurses: (Byers, Redmond, Milhoan, Howell, and Carnes, who was a part time employee).

On May 18, Blaine Ritchie attended a rally and the informational picket line established by the Union. Ritchie was interviewed by a local television station and appeared on both the 6 and 11 o'clock news and was pictured stating that Mary Jane Jones had recognized the Union on January 24 but had reneged on that promise. He also was shown saying that they had organized because they loved the residents and wanted to make sure they were being taken care of in the way they deserved.

As noted above, on February 4, Ritchie, was listed as a union alternate representative for the habilitation aides. Ritchie also designed union T-shirts (these T-shirts duplicate the union petition for recognition and show all the employee signatures), and distributed them on February 20, at mandatory meetings that was attended by supervisors, including Fithian, who was observed writing as each employee took a shirt from Ritchie.

Ritchie also presented another employees' petition to Jones in person on March 13.

On May 24, 6 days after he appeared on television, Ritchie was preparing to give resident ''Donald'' a shower and shampoo as he had done hundreds of times. As he turned on the shower, he ''felt'' Donald falling because of the manner in which Donald was holding Ritchie's arm. Donald fell to the floor and hit his head. Ritchie called for help and substitute LPN Aaron Rowe came to the room.

Rowe stated he was in the hall about 30 feet from Donald's room, making his ''med'' rounds, when he heard Ritchie's call. He pushed his ''med'' cart into the room but could not estimate how long it took him to get there. He said he found Ritchie with Donald in his arms and the Donald had a head injury ''a pretty good cut, skin tear. I can't really recall.'' Rowe said he charted the incident and Donald was taken to the hospital (because it was standard procedure for some one in Donald's status).

Ritchie testified that when Rowe came in he told Rowe that he ''didn't know what happened.'' Rowe filled out the incident report by indicating that there was an ''abrasion'' on the forehead and also wrote ''unattended at time of fall.'' Ritchie went with Donald to the hospital and returned near the end of his shift. When he returned the next day he made his own incident report and latter was questioned by his supervisor for more details. Ritchie then described how Donald (who is epileptic and subject to seizures, walks with minimal assistance and wears braces and a helmet when not in bed or the shower), fell in the shower as he was turning the water on, that Donald was not alone but that he didn't know if he had a seizure or had slipped on the wet floor, that the LPN had responded to his call in 1-1/2 to 2 minutes and was told the resident had fallen, that the LPN briefly checked the resident and asked what had happened and that he had said he didn't know whether it was a seizure or slip on the wet floor. Ritchie also said he observed Donald was ''chewing'' at the hospital and that this behavior for him was a common activity after he had had a ''grand malle'' or ''petite malle'' seizure.

On Wednesday, May 27, Fithian called Ritchie to his office and was asked to redescribe what had happened on May 24 and was told what the LPN had put in his notes. Ritchie denied that he had left Donald unattended. Fithian called Rowe and then told Ritchie he believed Rowe because he was a professional, that he found Ritchie negligent and that negligence was ground for termination. He then told Ritchie to turn in his key.

After the LPNs were suspended, the Respondent used the services of a temporary agency to obtain nurses (including Rowe) at a cost of $20 per hour (the suspended LPNs were paid approximately $11 an hour). In June, prior to the LPN's terminations, it began advertising for LPNs.

Jones, after viewing Robb's report, received an endorsement from Manning and terminated all the suspended LPNs by letter mailed June 18 which stated the reason was because they ''exhibited complete disregard for the duties of your job.''

On May 29 Donna Yeager (day-shift union representative for habilitation aids) was suspended for 5 days by Fithian. On June 10 she was again suspended and then discharged by Habilitation Coordinator Fristic.

As noted above, other events occurred during 1992 which also are alleged to constitute unlawful labor practices and to be part of the Respondent's overall pattern of response to its employee's exercise of their Section 7 rights to form, join, and assist a union and they will be discussed below.

III. DISCUSSION

The issues in this case arose when the Respondent suddenly cut off its past, open communication practices between top supervisors and its staff in an apparent reaction to the employees' overwhelming selection of a union to act as their representative for collective bargaining. The Respondent, after its administrator appeared to have voluntarily recognized the Union, then refused all communication with the Union and embarked on a campaign to avoid such recognition, to force an election process and, as shown below, to interfere with or retaliate against those who most actively supported the Union.

A. *Recognition of the Union on January 24*

On brief, the Respondent makes the specious argument that the bargaining unit described in the Union's January 24 recognition demand consist of ''LPNs, Habilitation Aides, Therapy Aides, Dietary Employees, Housekeeping Employees, Maintenance Employees, and the Seamstress,'' whereas the unit described in the complaint consist of:

> All full-time and regular part-time licensed practical nurses, habilitation, activity, therapy, and psyche aides, dietary, social service, housekeeping and maintenance employees, and seamstresses employed at the Employer's Lisbon, Ohio Facility, but excluding the administrator, program director, director of nursing, dietary manager, social services director, registered nurses and all professional employees, guards and supervisors as defined in the Act.

and that therefor the ''unit'' alleged in the complaint dated September 15 is not proven by the General Counsel. The latter unit, however, is the unit actually recognized by the Respondent on October 12. I find that it does not add any new employees but merely clarifies the inclusion of activity and psyche aid positions that otherwise were broadly within the habilitation and therapy aids first described and it reflects the apparent unit anticipated in the mutually agreed upon election proceeding that was canceled prior to the October letter

of recognition. Moreover, the Respondent stipulated at the beginning of the hearing that there were 42 valid authorization cards signed in the unit as of January 24 and, as these 42 cards included all but 2 of the Respondents 44 employees I find that the proof at trial and evidence of record properly correspond to the allegation of the complaint.

Respondent also argues that Administrator Jones did not have the authority to act on behalf of the board of directors in the matter of union recognition, an argument that seems strangely out of place in view of Respondent's stipulated submission of Joint Exhibit 1, Respondent's letter to Union Representative Timko on Respondent's letterhead, which offers Respondent's recognition of the Union and the described unit of employees, a letter that is signed solely by Jones, as administrator, and a letter that makes no mention of otherwise being authorized or done at the direction of the board.

The self-serving notes of the board indicates that they discussed that Jones did not have authority to recognize the Union's demand, however, at no subsequent time prior to its recognition of the Union on October 12 did the board or anyone on its behalf communicate to the Union or the employees any disavowal of Jones act of apparent authority. Moreover, during 1992 the board and its individual members rebuffed the attempt of employees to discuss the matter with them and hid behind the skirt of their administrator.

Respondent's board of directors cannot have it both ways, if it alone had the authority, it had the responsibility to meet the employee representative, to communicate some formal disavowal of Jones' action and to make the second and formal offer of recognition. It did not do so and I find that Jones had both the actual and apparent authority to act in this regard on behalf of the Respondent.

Otherwise, it is well established that an employer is bound by the acts of those of its officials who are in charge of the day-to-day operations at its facility and who possess actual authority, or at the very least, apparent authority, with respect to labor relations matters, see *Richmond Toyota*, 287 NLRB 130 (1987), and *Nemacolin Country Club*, 291 NLRB 456 (1988). Here the credible testimony of record shows that Jones verbally agreed to recognize the Union when the demand and petition were presented to her on January 24.

Although Jones and the Respondent thereafter attempted to minimize or twist the import of what she said, I find her testimony in this regard to be evasive, argumentative and misleading, and I specifically credit the employees' descriptions of the event and find that after Union Representative Timko identified herself and the recognition request, Jones agreed to recognize the Union. I also find that Timko then specifically questioned Jones' understanding regarding recognition and that Jones acknowledged her affirmative understanding.

Jones' followup letter of January 26 uses a few phrases that Respondent seizes on to argue that Jones' words and letter merely recognized that the employees wanted a union and an election and not that she recognized the Union.

Although Jones' bitterly worded letter may have some ambiguous phrasiology, it manifest itself most clearly with repeated reference to dealing with the employees' union representative. Most specifically, Jones acknowledged her ''positive reaction to your request to form a union'' and further wrote:

> I have only one piece of advice to pass on. Choose your inhouse union representatives carefully. Legal Counsel has advised me to close my open door policy. I will address employee problems, but only through a third person, the Union representative. I am not scared of your union or threatened by it in any way. If I was, I definitely would not have so graciously recognized your position. Good Luck. I will do my best to work with your representatives to correct the deplorable working conditions present at the facility.

Under these circumstances, I find that the Union demonstrated majority status and that the record persuasively shows that Respondent recognized the Union on January 24, that the Union and its employees clearly understood that this had happened, that Jones' memo of January 26 acknowledged that she has recognized and intended to bargain with the Union, and that the Respondent did nothing to communicate a disavowal of this recognition except to refuse to engage in further discourse or negotiations with the Union.

Inasmuch as an original commitment was made, the Respondent cannot unilaterally withdraw its recognition and refuse to bargain with the Union and by doing so it has violated Section 8(a)(1) and (5) of the Act as alleged, see *Nantucket Fish Co*., 309 NLRB 794 (1992).

B. *Discharge of Blaine Ritchie*

The record clearly shows that Ritchie's name was posted on February 4 identifying him as an alternate union representative. He openly distributed union T-shirts to employees at a meeting at Respondent's facility in the presence of supervision, he presented Jones with union petitions involving health concerns and, most significantly, on May 18, just days before his discharge on May 28, he was shown on television at a union demonstration, questioning the good faith of Respondent.

In a discharge case of this nature, applicable law requires that the General Counsel meet an initial burden of presenting sufficient evidence to support an inference that the employee's union or other protected, concerted activities were a motivating factor in the employer's decision to terminate him.

The evidence otherwise establishes a clear record of antiunion animus on the part of the Respondent which is demonstrated in Jones' bitter letter to employees and in the overall extreme level of noncooperative conduct engaged in by several supervisors after it became apparent that Respondent's board of directors wished to avoid dealing with the Union. This finding of animus is also reinforced by Respondent's prolonged withdrawal of recognition and its refusal to bargain (especially where the Union had demonstrated such an overwhelming level of support), and its demonstrated disregard for employees' Section 7 rights by its repeated participation in independent and numerous violations of Section 8(a)(1) and (3) of the Act, as discussed below.

Here, the factors set forth, as well as the showing discussed below that Respondent's reasons for Ritchie's termination was pretextual, all demonstrate unlawful motivation, see *Dorothy Shamrock Coal Co*., 279 NLRB 1298 (1986). Under these circumstances, I find that General Counsel has met his initial burden by presenting a strong prima facie showing, sufficient to support an inference that Ritchie's union activities were a motivating factor in Respondent's decision to terminate him on May 28.

Once the General Counsel establishes a prima facie case, the burden shifts to the Respondent to show that it would have taken the same action even in the absence of union considerations. See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983). In light of the General Counsel's strong prima facie showing, the Respondent's burden here is substantial. Accordingly, the testimony will be discussed and the record evaluated to consider Respondent's defense and, in the light thereof, whether the General Counsel has carried his overall burden.

Respondent contends that the discharge took place because its policy is that ''resident neglect won't be tolerated and is grounds for termination'' (its written policy states that ''intentional physical resident abuse or neglect'' would be grounds for termination. It also maintains that its progressive discipline system is only a ''guideline'' which can be suspended in serious cases and that Ritchie was terminated under its policy because Ritchie ''intentionally'' had left a resident unattended in the shower.

Supervisor and Assistant Administrator Fithian testified that he discharged Ritchie because he didn't believe Ritchie's explanation of what occurred saying that ''based on his past history'' both before and after the start of union activity, ''his word was not extremely reliable,'' and that he believed LPN Rowe because he would take the word of a professional ''as being more responsible.''

Ritchie had been employed as an aid by the Respondent for over a year and had cared for and given Donald (who is physically larger than Ritchie), showers on over 100 occasions. His ''past history'' included two brief suspensions for carelessness in April and May 1991 (under Respondent's policy, prior discipline remains current for 180 days for consideration of progressive discipline). Ritchie has only 65 percent usage of his right arm, however, this has not appeared to have been a handicap that has affected his duties and the record shows that he otherwise had developed a strong rapport with Donald, who was considered to be one of the more difficult residents to care for.

In addition to Donald, Ritchie normally was assigned to aid three other residents on the same shift. His prior discipline was for hopping the curb when he drove a vehicle into the facility's driveway and for leaving out a hair dryer in a resident's room. There is no indication that either incident involved a question of veracity. He received an evaluation from Fithian in November 1991 and was rated high enough to receive a pay raise. Otherwise, I find that he testified in a sincere and believable manner and I find that he was a highly credible witness.

LPN Rowe testified in basic support of the incident report he had prepared, however, his testimony was initially evasive, especially in relation to his ''professional'' background and he often was hesitant or inconsistent or unsure. For example, on direct he first testified about Donald's injury that: ''It was a pretty good cut, skin tear. I can't really recall.'' He then testified that he accurately filled out an incident report indicating Donald had a ''laceration'' on his head, however, the report notes an ''abrasion,'' a description consistent with Ritchie's testimony. Also, in answering a question about how long it took to respond to Ritchie's request for help he said he ''couldn't say'' and, when asked if it was less than a minute, he again responded he ''couldn't say.''

Significantly, when Rowe was asked when he graduated from LPN school, he said he couldn't ''remember the date.'' He then reluctantly admitted that the nursing employment agency he worked for was his first job he received after graduation (which apparently had just occurred), that his first assignment to a home or hospital was to Respondent's facility and that the incident occurred on his first day of work. Rowe also indicated Ritchie said something about getting the shampoo, but then qualified his statement and said that he wasn't sure and that perhaps he said that (he also admitted that the shower stalls have the shampoo in them).

Ritchie was highly experienced in caring for Donald and had no prior record of ever leaving anyone ''unattended'' especially while bathing them, yet Fithian chose to give full credit to the assumptions of Rowe, a nonwitness, who did not see Donald unattended and who had just started as an inexperienced replacement for the suspended LPNs.

Here, it is highly likely that Rowe made several hasty assumptions and jumped to conclusions that he was reluctant to back down from due to his almost total inexperience and, in effect, he incorrectly assumed Ritchie left Donald unattended because Ritchie said he didn't know what happened and may have said something about getting shampoo.

Fithian rejected the more likely explanation given by Ritchie and I find that Fithian's reason, that it was because Rowe was ''a professional'' is pretextual in light of Rowe's extreme lack of professional experience. The other reason Fithian asserted was that he didn't believe Ritchie was because Ritchie's ''word was not extremely reliable'' based upon unspecified ''past history'' both before and after the start of union activity.

Here, one glaring aspect of Ritchie's ''past history'' was his statements on local television that Jones had recognized the Union but reneged and that the employees had organized because they loved the residents and wanted to make sure they were cared for properly. This statement was made just 10 days before the discharge and I infer that management's and Fithian's disagreement with the reliability of Ritchie's ''word'' was based on his televised statements and was a significant factor in the decision to discredit Ritchie's explanation.

Moreover, Fithian did not chose to classify the alleged incident as ''carelessness'' as provided for in the policy guidelines or to effectuate the progressive discipline system. Respondent's disciplinary outline list:

> Carelessness which could endanger the resident or other staff. Examples: Leaving a resident unattended in any area. Leaving out a straight edged razor.

Instead, the alleged offense was escalated into ''intentional neglect of a resident'' and the most severe penalty possible, termination, was immediately put into effect. Significantly, on June 24, 1 month after Ritchie's incident, Christa Viets, one of the few employees who did not support the Union, received a warning involving the same resident, when he tipped over in his wheelchair after Viets failed to make sure that another employee was watching. She was charged with carelessness which would endanger the resident and given a 3-day suspension. Respondent's records show that they cred-

ited her explanation that she had told other employees that she was leaving, but no one had heard her.

Also, one of Respondent's exhibits reflect that Twylla DeBray was only warned in May 1990 for using excessive force and roughness with residents and was not discharged until she had a second occurrence for excessive force in a 2-week period.

Under these circumstances, I find that the Respondent's stated reasons for discharging Ritchie are not supported by persuasive, credible evidence, and otherwise are pretextual. Ritchie's alleged ''unreliable word'' is not based on any objective criteria and I find that the Respondent seized on an opportunity to elevate an accidental fall into the category of a dischargeable offense because of Ritchie's union activities, activities emphasized by Ritchie's television appearance a few days earlier. The Respondent otherwise has failed to show that Ritchie would have been discharged under these circumstances absent his and the other employees' union activities. The General Counsel has met its overall burden of proof and I further conclude that Respondent's discharge of this employee is shown to have been in violation of Section 8(a)(1) and (3) of the Act, as alleged.

C. *Suspensions and Discharges of the LPNs*

The Respondent suspended its entire staff of LPNs on May 18 and it appears that this action served as a prelude to an apparent change from its outwardly passive, do nothing overt against the employees attitude (except to formalize and increase warnings), to a direct, confrontational approach against union activist, as exemplified by Respondent's dealings with Ritchie.

Shortly after the Respondent's apparent internal decision to disavow Jones' recognition of the Union, Jones requested that Fithian make an investigation of the old personnel files to review the past disciplinary actions against employees prior to 1992. In February, Fithian began his investigation and prepared a chart of all the disciplinary action taken on all employees between 1989 and 1992. The chart showed two persons terminated in 1989, eight persons in 1990, and five in 1991. On April 22, 1991, one LPN, was terminated, for ''unprofessional behavior, and failure to follow policy'' (smoking in the nursing station). She was the only LPN to be fired because, as stated by the Respondent, the work records of the other nurses were uniformly excellent prior to January 24, 1992.

The Respondent claims that its record of discipline (including its subsequent issuance of some warning to a few persons it considered to be procompany), is ''evidence of a total lack of Union animus'' and throughout Jones' testimony, she continually maintained that she had no idea who the union organizers were. She further stated that she had no idea who tried to sabotage the state survey, and didn't have the faintest idea which employees had filed charges with the various state agencies. She also stated that she never equated that the alleged sabotage and the Union's attempt to organize were related and she stated that when she used the term ''organizers'' or ''pushers'' in correspondence she had no names in mind.

As discussed in section B, above, the overall record here supports a basic showing of antiunion animus on the part of the Respondent, a showing that is further tied in to a consistent pattern of actions taken against many of those employees who were publicly identified as union representatives (or their alternates), of various departments. Most of the involved LPNs were involved in specifically identified notorious union activity. Briefly, Byers was the first named committee member and her name was often in the newspaper as a union spokesperson, Redmond's name was next to Byers as alternate representative, both were standing next to Union Representative Timko when Jones was presented with the petition and demand for recognition, and both thereafter continued to publicly act on behalf of the Union in seeking recognition. Milhoan's home was openly known as the location for union meetings. Lorena Howell was not called to testify (she was recalled by Respondent in October 1992 and thereafter voluntarily resigned), however, the record shows that she signed the petition and an authorization card, and was given a warning by Nursing Supervisor Manning on January 28 at which she insisted that Redmond (the union representative for her shift) be present in the meeting. Otherwise, there is ample evidence to support an inference that this mass layoff of all regular LPN staff was for the unlawful purpose of discouraging union membership and, under such circumstamces, it is not necessary for the General Counsel to prove the employer's knowledge of specific employee activism, see *Federal Screw Works*, 310 NLRB 1131 (1983), and also *Alliance Rubber Co.*, 286 NLRB 645, 647 (1987), and *Superior Coal Co*., 295 NLRB 439, 455–458 (1989).

Here, the evidence shows that the Respondent converted the May 18 suspensions of the LPNs to discharges 30 days latter, that none of the LPNs were given the opportunity to defend themselves against any asserted deficiencies, and that the Respondent used the services of costly temporary agency LPNs in early June prior to the terminations. The timing of these suspensions and terminations and the contemporaneous terminations of union activists Ritchie and Yeager (discussed below), at a time when the Respondent was seeking to avoid acknowledgement of Jones' recognition of the union and was seeking the direction of an election, also tend to show that Respondent's actions towards the LPNs was motivated by their strong union involvement and a desire to undermine the Union's efforts at the facility.

I find that these factors persuasively show that antiunion animus was a motivating factor in the Respondent's decision to suspend and terminate these nurses and I further find that the absence of a plausible and nonpretextual explanation for its actions, as discussed below, further confirm the inference of unlawful motivation and combine to support a conclusion that the General Counsel has established a strong prima facia showing that the employees' union activity was a motivating factor behind Respondent's actions. As noted above and in *Wright Line*, supra, the burden now shifts to Respondent to show that it would have taken the same action even in the absence of union considerations.

Here, Respondent's defense is based on an elaborate attempt to show that it validly relied on the findings of the Ohio Department of Health's (ODH) annual review and its own investigation to conclude that the LPN had engaged in willful misconduct that jeopardized both the well being of the residents and the Respondent's state certification and that this misconduct justified their terminations.

I am aware that some (courts) have expressed a skepticism regarding the extent to which an employer is willing to suffer loss of business or other operational or economic losses in

order to delay or avoid the feared effects of employee unionization. While it may make little sense in an objective, after-the-fact viewing, employers can be obstinate to the extreme when faced with the challenge of unionization and they can be willing to suffer preceived temporary losses or inconveniences in order to delay or avoid the perceived long-term effects that formal certification of a union might bring.

As unlikely as it might appear at first glance, I find the record here supports the General Counsel's contentions and shows that the Respondent engaged in ''indifferent'' behavior that intentionally or inadvertently ''set up'' circumstances that created an apparent opportunity for it to seize on the report of a state agency to justify significant retaliatory actions against its LPNs that it otherwise had refrained from taking (upon the admitted advice of its initial counsel), after its initial discriminatory reaction in issuing a series of employee warnings.

Unfortunately, I also agree with the General Counsel's assessment that Administrator Jones ''became upset, outraged and paranoid over what had transpired,'' and that, those feelings were shared by Nursing Director Manning and ultimately pervaded the entire organization.

Jones' behavior is exemplified by her bitter letter of January 27 in which she reacts to the overheard unkind remark of a single employee and to her perception that other employees were now avoiding eye contact with her. Manning's testimony shows that she also became so sensitive about the employee's perceived failure to initiate communication with her that after the issuance of some early warnings in late January and March, she issued no further writeups and initiated no meetings or discussions with her LPNs even though she alleges generally that these employees were creating problems and refusing to follow orders. Manning testified that she heard the LPNs were ''out to get her'' and discussed this rumor with Jones. Incredibly, Manning took no actions to correct any perceived operational problems and took a completed ''hands off'' attitude to any significant supervisory function, apparently even refusing to review normal reports and paperwork, stating that they ''knew what they were supposed to do'' and that she ''didn't have to tell them.''

While Manning admitted they all the LPNs previously had been ''good nurses'' she also admitted she knew they were all union supporters. Jones, however, continuously maintained that she had no idea they were behind the union organization, an assertation that clearly is at odds with nurse Byer's notorious behavior and with Manning's testimony that she had discussed this (as well as her observations that the nurses were not doing their jobs), with Jones and Fithian.

It is clear that the LPNs as a group engaged in protected concerted activities and, as a group, attempted to meet with the administration about working conditions. Their request were denied and thereafter they sought redress through communication to various state agencies. Some of these complaints were reflected in some of the citations in the ODH survey.

During April 1992, the State conducted its annual survey of the entire facility, a survey that had historically been conducted around the same time each year. During past surveys, the nursing department had gone through extensive preparations for the survey, which included meetings and reviewing cue cards. Likewise, Milhoan had always reviewed the records for documentation errors. However, prior to the 1992 survey, nothing was done in preparation.

After the survey, in which the facility received over 50 citations, Jones held a mandatory meeting of employees and blamed nursing for sabotaging the records. The LPNs were never shown the survey results and Manning admitted that she never discussed the citations with the nursing staff and never inquired of them about their conduct, testifying that she did not do so because she believed their actions were intentional.

Jones testified that she had reviewed the citations, and speculated that the nursing staff was directly responsible for 35 percent of the citations. Byers, who received a copy of the citations after the nurses were suspended, consulted with various state representatives, reviewed the citations, compared them with the Rules and Regulations which she had received and prepared a summary (G.C. Exh. 63) which was utilized by the LPNs in their successful presentation before the State Bureau of Employment Services which bureau decided the claimants were placed on disciplinary layoff not for misconduct (based on a factual conclusion that the claimants were not guilty of willful negligence nor misconduct in the performance of their work). Byers' summary indicates that approximately 7 of 60 citations were attributable to nursing services plus 2 with mixed responsibility.

In May, Jones hired Robb (who had previously been the director of nursing prior to Manning) as quality assurance nurse to look into the nursing department, review the citations, and audit all the nursing documents and charts ''to assess the blame.'' Robb never talked to any of the LPNs, never gave them the opportunity to explain any of their documentation, and never talked to any of the doctors involved. Although there were 22 residents, she reviewed the charts of only 6 residents. By May 18 when the LPNs were suspended, it appears that she had only reviewed the documentation for two residents and she did not submit her second report until May 19. She also testified that she made no recommendation that the nurses should be suspended, but continued her audit and then orally gave a report to Jones on June 10. She turned in a typed report on June 17 which began with this preface:

> The attached information is a compiled report of the nursing documentation including February through some of April and May. This report includes the most serious documentation errors made by the nurses as listed below and serves as the back up documentation needed to support their suspension from this facility and subsequent termination.

Robb also testified that at some later date she reviewed the charts of the remaining 16 clients after she had completed her final audit. She testified that she found no problems with their records and that they were up to standard.

Jones testified that no action was taken against any other employees because of the citations and none were even given warnings even though the psyche aide, according to Jones, was responsible for 13 percent of the citations. Fithian admitted that the surveyors expressed no more concern about nursing than they did about active treatment, however Jones testified that termination of the LPNs was her decision, based on the quality assurance report, and that her decision had nothing to do with any warnings the nurses had been given pre-

viously. She also testified that she did not follow progressive discipline, because the audit was ''so monumental'' that she considered what the nurses did was intentional physical abuse or neglect to the residents (even though, to her knowledge, nothing serious happened to any resident).

Otherwise, Respondent's ''investigation'' did not include any input or opportunity for the LPNs to explain the citation items to Respondent prior to their suspension, and although Jones characterized the LPNs' behavior in terms of ''sabotage'' and ''intentional abuse'' and ''neglect,'' she showed no similar concern for any responsibility at any supervisory level, including Manning and herself.

The record shows that the nurses, as a group, were upset with the practices in the nursing department and such things as orders being altered, workloads, the unavailability of Manning, and the belief that Manning had asked Redmond to lie for her on several occasions. They had met and discussed these problems and Redmond approached Fithian about them but he exhibited no interest in the problems in the nursing department (Fithian acknowledged that Redmond had talked to him about Manning in January and said that Manning has asked Redmond to lie for her, but he admitted he was not concerned).

On January 29 Byers and Redmond met and wrote two letters to Fithian and Jones, requesting that they meet with the nurses to discuss the problems in the nursing department. Redmond, who working that night, taped the letters to the door of the main office and when she left that morning, she observed the letters still taped to the door. Shortly thereafter, Fithian approached Milhoan at the copy machine and indicated that he had received communications from a couple of nurses but that he didn't know who to believe. Milhoan responded that there were problems in the nursing department but she did not feel comfortable discussing it with him alone. She further stated that since it was a group problem, they should discuss it as a group. Fithian acknowledged having some conversation with Milhoan at that time at the copy machine and that he had asked her what Manning had ever done to make her so upset and why she felt they needed a union. Fithian said he believed a union would hurt the facility, but Milhoan stated that she had a different opinion. Fithian admitted he had asked the question about Manning because he had heard rumors around the facility as to how the nurses were treating and reacting to Manning and, under these circumstances, I find that Fithian had also seen the letters before he then confronted Milhoan.

Byers, Redmond, and Milhoan all testified that after they got no response from the Respondent, they filed charges with the Ohio Department of Health because of their concern for their license and the welfare and safety of the residents and because the Union had told the employees as to their rights, including their right to act concertedly and to raise concerns with various state agencies.

Jones testified that she did not know who had filed complaints with the Ohio Department of Health, but inconsistently also said she was pretty sure they came from nursing because of the nature of the complaints.

Despite the Respondent's elaborate effort to find fault with the LPNs, both as a group and individually, I find it unnecessary to analyze each instance cited because it otherwise is shown that these ''reasons'' were essentially documented after the fact (Robb's so called ''investigation'' was after the suspension and the stated purpose of the ''investigation'' was to justify a preordained conclusion). Moreover, the LPNs were not given any opportunity to explain or defend against the alleged deficiencies and the alleged deficiencies were substantially explainable and not of a character that reasonably would be chargeable only to the LPNs or so significant that they could be elevated to a level of ''misconduct.'' Otherwise, I find that the nurses' explanations, given at the hearing where they finally had an opportunity, basically tend to establish that they in fact had used prudent nursing care that was not substandard or indicative of misconduct.[3]

Respondent's reasons for finding misconduct and its overall reasons are not shown to be valid in the absence of any meaningful investigation and it otherwise is clear that the Respondent disregarded its own managerial responsibilities by changing from its past practices of providing routine supervision and preparation for the annual state surveys. It is clear that the Respondent could have expended some effort in responding to the ODH citations with probable valid explanations (just as it could have reviewed and updated its records even if this was no longer required by one of the state agencies). It did not do so and instead accepted each citation even remotely connected with the LPNs, placed the blame almost entirely on the LPNs (not on other departments or supervisors), and then selected a purge of all of its LPNs as the remedy to satisfy the State's desire for corrective action.

Thus, in order to ''improve'' its service to its resident, it replaced all of its regular LPNs, all acknowledged to be good nurses and all mature and experienced with the individual residents of the home, and replaced all of them with ''temporary'' nurses, including those of the caliber of LPN Rowe who was totally inexperienced as an LPN, let alone experienced with the individual residents. I find that the Respondent has failed to persuasively show that it relied on valid, plausible reasons for its actions in suspending and terminating all of its LPNs. The Respondent's reliance on the citations of the state survey and its own apportionment of blame to the LPNs is not plausible in light of the overall circumstances discussed above and I find that the Respondent has failed to rebut the General Counsel's strong showing that

[3] For example, one ODH citation involved followup care on an abdomenal stoma on Donald which was a concern of the inspector because it was red and irritated and they couldn't find on the chart where the doctor had been notified or the followup care. LPNs Byers, Redmond, and Milhoan were all faulted for their participation in charting Donald's stoma care by not notifying the director of nursing or a doctor. Byers credibly testified about ''in service'' training they had received concerning Donald's stoma care (an ongoing condition for drainage of his bowels), that her charting was consistent with this training, that redness and drainage was a regular occurrence, known to the director of nursing and reviewed monthly by the physician in his regular visit. Redmond confirmed her observation that the doctor visiting Donald twice during this time period, and Respondent's management knew of the regular physician visits and had its own knowledge of residents. The Respondent, however, insist, on brief, that this fact is ''contradicted'' by the survey report that the stoma was not evaluated over a 3-month period. Then, rather than explain the care record to the State or accept supervisory responsibility, it seized on this and other explainable items including a syringing order, a diet order, and the appearance of a medication error, and chose to assert intentional malfeasance on the part of the LPNs without seeking or allowing any explanation.

it was motivated by antiunion considerations (as well as by their concerted protected activity in filing complaints with various state agencies), see *Mapleview Nursing Home*, 302 NLRB 211 (1991).

The General Counsel otherwise has met his overall burden of proof and has shown that Respondent would not have purged its entire staff of LPNs absent their strong leadership roll in the ongoing union activities at the home and, accordingly, I conclude that the Respondent's suspension and discharge of these employees violated Section 8(a)(1) and (3) of the Act, as alleged.

D. *Discharge of Donna Yeager*

Donna Yeager, an employee since 1986, was named as the day representative for the habilitation aides, on the posted February 4 notice that listed the bargaining committee and was observed on Fithian's desk. Yeager also was involved in the initial organizing campaign and obtained authorization cards from other employees. As noted, in October 1991, she held a position as an assistant supervisor. Fithian stated that before 1992, Yeager's work with residents was excellent, but he alleged that after the Union appeared, he experienced problems with her job performance.

On May 28 (after the regular nurses had been suspended) the staff experienced problems with the resident involving the med pass and loading residents on the bus, when the ODH survey team was again in the facility. Yeager was heard to say to another staff member that if the replacement nurses had been trained properly, this would not have happened. When Yeager followed a troublesome resident to find out whether or not he would be able to be placed back on the bus. Robb, the quality assurance nurse, slammed the door in Yeager's face. Yeager wrote up the incident, which was signed by three witnesses, and gave it to Fithian. Fithian read it but said that it did not coincide with the account submitted by Robb. He said that under the circumstances, he would have to side with Robb. Yeager testified she answered: ''Union,'' and he said ''yes,'' and that he further said that he was tired of the ODH survey team being in the facility and that he was aware of an 800 number (for complaints), being posted in the facility. Yeager admitted that she had posted the number in the facility and had given the number to other employees.

On the following day, Fithian gave Yeager a 5-day suspension in the presence of the new habilitation coordinator, Kathryn Fristic. Yeager returned to work after her suspension, and on June 10, was assigned six residents, including Jimmy, a troublesome resident generally assigned one on one. (Fithian testified that Jimmy was assigned one on one many times because of his violent ''behaviors'' and subsequently was sent to another facility because of his behaviors.) While Yeager was on the couch with Joey (who was having a behavior problem and was biting his nails), attempting to redirect his behavior by getting him to play a game, Jimmy began to bang his head on the door and Yeager attempted to verbally redirect him. At this point Fristic and Richard Carrigan, the county case manager, came down the hall and observed what was happening. Fristic told her to do something. Yeager responded that she was attempting to verbally redirect Jimmy and if Fristic would sit with Joey, she would walk Jimmy. Fristic did nothing and eventually other staff members helped Yeager.

Fristic approached Yeager and told her ''don't do that again,'' ''don't ask me for help in front of a case manager.'' When Yeager started to walk away, believing Fristic was finished, Fristic called her back, said she was not finished and told Yeager she was suspended.

Fristic testified that she observed Yeager for several seconds and agreed that she, herself, took no action to help out. She also agreed on cross-examination that she told Yeager to get up to attend to Jimmy and that Yeager did so within several seconds of being told. She also testified that she fired Yeager because ''she ticked me off'' by challenging her authority and because of Yeager's insubordinate attitude by asking Fristic to take care of a resident while Yeager was taking care of another. Carrigan testified that he observed Yeager say something to Fristic to the effect of ''who was going to take care of the patient she was sitting with.''

Fristic was a newly hired supervisor who lacked formal education beyond high school but had 11 years' experience working with the mentally retarded. She was hired by Fithian in May and had only worked with Yeager on three occasions prior to June 10 but asserted that Yeager was ''just nasty in her comment'' and ''tried to intimidate me.'' Fristic also testified she was aware of Yeager's previous suspension and that she was told by Fithian it was because of her attitude, for not cooperating, for being disrespectful. She then testified that she did not know if she would have fired Yeager if Yeager had not received the previous suspension.

Fristic spoke with Manning who prepared a typed memo detailing reasons for termination which included the accusation that Yeager had ''also failed to follow policy and procedure pertaining to the welfare of a client that eventually lead to a crisis situation for the resident'' (this memo was given to Yeager at her request).

Fristic testified that the staff just ''blew me off'' from the very beginning of her tenure and was uncooperative and that Yeager was that way more so than the rest. She said she didn't know and couldn't recall if any of them were written up for their actions, that she couldn't recall any insubordination by Yeager that occurred prior to the discharge event, and that she knew that on Yeager's return from suspension Yeager had guidelines to follow and ''had to be cooperative and change her attitude.''

Fristic's demeanor as a witness was crude and abrasive and she herself testified that:

> At first nobody was coming to me. I mean I was just brand new. They didn't know—you know, they didn't know my personality. They didn't know how to take me and then they started coming.

She also testified that she was hired by Fithian to make sure the direct care staff was implementing ''active'' treatment in response to items in the ODH citations and that she believed that noncooperation from the staff was a result of those people being for the Union.

As discussed in sections B and C above, the General Counsel here also has established a strong prima facie showing of antiunion motivation and the burden rest on Respondent to show that it would have taken the same action even in the absence of union considerations.

Here, I find that Respondent's perception of ''noncooperation'' by the staff because of their union involvement, influenced and preconditioned Fristic to act and re-

spond to her staff in an overly harsh manner which provoked a response that was most likely one of caution or fear, because in Fristic's own words, ''they didn't know my personality. They didn't know how to take me.'' Yeager then was discharged for having an attitude of uncooperation and this ''attitude'' was projected by management on all the employee union adherents, especially the activist. This perceived ''attitude,'' however, was engendered, at least in part, by Respondent's own attitude of hostility and its policy of noncommunication with employees. In Yeager's case this management attitude was further projected in a provocative manner by Supervisor Fristic and I find that Yeager's response thereto was nonphysical, did not reflect any refusal to cooperate, and did not rise to a level that could be considered to be insubordinate or so egregious that would have justified discharge under the circumstances. See *Wilson Trophy Co. v. NLRB*, 989 F.2d 1502 (1993), affg. *Wilson Trophy Co.*, 307 NLRB 509 (1992).

Fristic, with apparent knowledge of Yeager's union background and recent suspension, challenged Yeager over an innocuous situation and became ''ticked off'' in a few seconds. She immediately overreacted and suspended Yeager without further reflection because Yeager allegedly had failed to be cooperative and to change her attitude. That same day, with little additional reflection, the suspension became a written termination, which was prepared by Manning and endorsed by Fithian and which pretextually added grossly exaggerated conclusion that Yeager had failed to follow policy and procedure that led to a ''crisis'' situation for the resident.

These circumstances fail to show a valid, plausible reason for Yeager's termination of even for her earlier suspension by Fithian. And, as that suspension was not shown by Respondent to be justified, it should not have been on her record and it could not properly be an element to justify termination, rather than some lesser discipline, for the alleged disrespect and lack of cooperation in the second incident.

In summation, I find that the Respondent has not shown that it relied on valid and plausible reasons in its discipline of Yeager and it otherwise has failed to show that she would have received such discipline under these circumstances absent her and the other employees' union activities. The General Counsel otherwise has met its overall burden of proof and I further conclude that Respondent's suspension and discharge of this employee is shown to have been in violation of Section 8(a)(1) and (3) of the Act, as alleged.

E. *Allegations Involving John Tharp and the Position of Habilitation Specialist*

John Tharp was selected as the representative for the therapy aides and was so listed on the notice posted in the facility and observed in management's possession. He also frequently wore the union petition T-shirt at work. Tharp started with Respondent in January 1986 on the direct care staff, he then became a rehabilitation specialist and was latter described as a therapy aid in the physical therapy department. In mid March Tharp, as well as several other employees, received a written warning for failing to sign ''in services'' in a timely manner. Several employees testified that in the past there had been no time limitation placed on employees as to when they had to sign in services. Tharp checked and affirmed that he had signed all the inservices on March 5 and 6, and then questioned Fithian because the warning was dated March 9. Fithian became argumentative and began to yell. Tharp left and Fithian later apologized.

Prior to April Tharp regularly worked 12:30 p.m. to 9 p.m. providing residents with special therapy programs, but in April Fithian told Tharp that he was implementing a plan to dissolve the existing therapy department and to give Tharp's programs to a rehabilitation specialist. Tharp was offered the option of working some programs on a split shift (apparently not full time), or of going back to the direct care staff on the 8 p.m. to midnight or the latter night shift. After a discussion with his wife he took the shift from 12 midnight to 8 a.m., however, his hours were reduced from 40 to 37.5 (subsequent to objections by the employees minutes were added to each day's shift to restore their normal hours to 40).

Fithian testified that in early March he determined on his own to conduct a timestudy on Tharp. He did not tell Tharp and he never told the Union. After his informal study, he concluded that Tharp was not busy enough and on March 19, he wrote a recommendation to himself to remove Tharp from his position. (The record shows that Tharp worked with four-five residents in the early afternoon when others were away at school on other programs and that he then worked with other residents after their return to the facility.)

Subsequently, Tharp was asked to train a ''hab'' specialist who was unable to do the particular program Tharp had done. After an apparent consultation with Fithian, nothing further was done. It also appears that several of the special programs done with specific residents (such as stretching various parts of the body that helped the physically retarded) were thereafter discontinued.

Here, I find that the Respondent changed its past practices concerning what constituted the timely signing of ''in services'' (in effect, training or informational releases), without notice to employees or the Union. I also find that because of the timing and numbers of warnings issued, its action was retaliatory in nature because of the Union's recognition demand. These warnings had a coercive effect on the employees' Section 7 rights, especially those of employee Tharp, inasmuch as Fithian did not rescind Tharp's warning even though Tharp demonstrated that he had signed the inservices previous to the warning date.

I also find no persuasive reason, other than Fithian's self-serving memo to himself, that would justify his decision to effectively take away some therapy programs from the residents by eliminating Tharp's previous position.

Under theses circumstances, I infer that Respondent determined to issue warnings to employees and to retaliate against Tharp by removing him from his therapy position (Tharp described his new direct care position as that of a babysitter, diaper changer), because of his support of the Union and I find that Respondent violated Section 8(a)(1), (3), and (5) of the Act in this respect, as alleged.

The record also reflects that, after the survey, the Respondent established the position of habilitation specialist. Fithian established the criteria for the position (part time, degree preferred, with courses in special education), assertedly to correct a survey citation regarding a ''lack of quality interaction between staff and residents. The first time the Union was told of this position was when they were at the city hall in Lisbon on April 15 to discuss an agreement for an election.

The positions were never posted, although there were staff members, including Tharp, who would have been interested, as the habilitation specialists performed work that substantially had been performed by other unit members. Although Jones assumed that none were qualified for the new position ''three of the four hired had a degree), Fithian admitted that there were employees who probably would have been qualified but he determined that they wouldn't be interested and he never asked them or opened the position for bidding.

As concluded above, the record otherwise supports an inference that this action disregarded employee rights and would not have been taken in this manner were it not for the union activity. Respondent ignored its duty to deal with the Union as the employees' representative and, accordingly, I find that it violated Section 8(a)(1), (3), and (5) of the Act, as alleged.

F. *Allegations Involving Gail Milhoan*

LPNs Gail Milhoan and Loren Howell (who subsequently resigned) were recalled to work in October 1992. Nursing Director Manning testified that she disagreed with management's decision to bring them back and she also rejected Milhoan's request that she be given a reorientation.

On October 22 Milhoan closed the nursing station door, as was the practice to ensure resident confidentiality, to give her shift change report to Howell. She later learned that Supervisor Fristic was outside the door as she did this. The next day Manning issued an inservice directing that the door was never to be shut.

On October 30, Milhoan was given a critical ''letter'' by Jones which mistated the circumstances of Milhoan's declining to drive Respondent's large van (because of eyesight problems). Respondent issued the critical letter without talking to Milhoan or otherwise investigating the circumstances.

On December 1, Milhoan was given an evaluation of 82 for the period from October 19 to November 19. Manning stated she gave an evaluation only 1 month after Milhoan was recalled because she thought it was appropriate. Milhoan's last annual evaluation prior to her discharge was 98. Milhoan asked Manning for specifics regarding her low evaluation but Manning could not give her any. Milhoan also was given a warning for not getting Manning's permission to trade schedules (which had never been the practice), even though Manning approved the change afterwards. She also was given a medication error report for an incident that occurred on November 14, and which had been another nurses' error.

On December 23, she was told that she would need a doctor's excuse for a 1-day absence (a change in policy).

On January 5, 1993, Milhoan called off work because she was suffering from stress. She was unable to see her doctor until January 7, who put her on leave. At this time, Manning had resigned, and Milhoan called the new director of nursing, Tammie Richardson, who said nothing. Richardson testified she had been told about the Union and about Milhoan's prior discharge and the circumstances, by both Manning and Administrator Jones. Richardson testified that she discussed every step taken involving Milhoan with Jones and that she thereafter wrote Milhoan a letter informing her that they were unable to honor her calloff request for January 5, and she was given a written warning. Also enclosed in the letter was a warning for her report off work on December 5, 1992, and for not completing her end-of-December reports.

Thereafter, Milhoan, her doctor, and Respondent began an exchange of correspondence in which Respondent generally refused to accept what was explained and progressively requested more information.

When Milhoan called to return to work after 3 weeks off due to her doctor's orders, Respondent told her that ''policy'' required 5 days' notice before she could return. After returning she then was informed that she would have to have a final letter from her doctor by the next Monday, or she would not be allowed to continue to work. Milhoan worked a 12-hour shift on the Friday before the Monday deadline. Her husband was to review the letter at the doctor's office that Friday and call her for authorization of its release. When her husband called the facility, Respondent refused to let him talk to Milhoan. On Monday she explained the circumstances to Jones and inquired whether it would be okay to have her doctor mail the letter, which would cause it to arrive 1 day after the deadline. Jones insisted that she pick up the letter and hand deliver it that same day. Richardson stated that even though Milhoan had finally provided doctor's excuses, the warnings remained in her file as she did not believe that Milhoan's reporting off for stress was an emergency.

Milhoan testified that in the past she had taken three periods of leave for stress or major surgery and had never been required to bring in a doctor's excuse or provide the documentation that Respondent demanded in January. At work on February 25 (after the hearing had started and with Milhoan in attendance), Richardson asked her what she found stressful on the job and Milhoan explained it was all written in the NLRB charges. After discussing some of the charges Richardson asked her ''why we felt we needed a Union, why we couldn't solve problems in house.'' Although Richardson denied ''interrogating'' Milhoan, I find that her questions had that effect.

Under these circumstances, including Respondent's record of animus and the fact that Milhoan previously was interrogated by Fithian about the Union, and for the related reasons also discussed below, I find that the Respondent has not shown plausible reasons for its dealings with Milhoan and I find that the General Counsel has shown that the Respondent has engaged in a pattern of retaliatory harassment and interrogation that has interfered with her Section 7 rights and has violated Section 8(1)(1), (3), and (4) of the Act, as alleged.

G. *Alleged Violation of Employee's Section 7 Rights*

It is well established tht Section 8(a)(1) of the Act prohibits interference with, and restraint or coercion of, employees in the exercise of their right to self-organization and that an employer's actions or threats of reprisals against employees if they select a union as their collective-bargaining representative or related actions are classic examples of behavior that interferes with employee's Section 7 rights.

Here, the record shows that Ellen Price, a direct care staff employee, attended a meeting in August in which Supervisor Fristic told the employees that they were to go through the chain of command with any problems and warned employees that if they went to an outside source, they would be terminated. On cross-examination Price stated that Fristic never qualified that above statement to only situations that involved patient confidentiality.

Fithian, who was at that meeting, said that Fristic told employees that they were expected to follow the chain of command and if they went outside the facility (with complaints), they would be disciplined. He stated he and Fristic had discussed this prior to the meeting because of statements he had heard were being said about clients within the community and that Fristic latter clarified her remark, however, Fithian could recall no specific statements. Fristic testified she stated to the employees that if any confidential information about residents left the facility, they would be terminated.

Susan Smith, who was employed as direct care staff, testified that on or about August 5, 1992, prior to a voluntary staff meeting, she heard Fristic tell three night-shift employees, that if anybody went outside the facility with complaints about the facility they would be terminated and that she was going to tell this to the employees at the 9 a.m. day-shift meeting.

Here, I find that the testimony of Smith and Price, who are still employed by Respondent, is credible, that Fristic's remark was not clearly qualified and that the prohibition was so broad that the remarks constitute a threat of reprisal against any employee who exercise his or her right to go to any agency, including the NLRB, to explain their concerns. Acordingly, I find that this constitutes a violation of Section 8(a)(1) of the Act, as alleged.

Some of the remaining incidents discussed below might appear to be marginal in their coercive effect if they stood alone, however, that is not the case here and I find that because of the Respondent's overall hostile, noncommunicative, antiunion attitude towards its employees after the union recognition demand and because of its wide ranging, numerous, and contemporaneous other violations of the Act, the incidents discussed below are inherently coercive and restrictive of employee Section 7 rights.

On February 11, in the same conversation in which she gave Bilsky a warning for missing an ''in service'' meeting Supervisor Buckley asked Bilsky if and why, she had signed a union card. Here, the fact that the question was asked in a disciplinary context demonstrates the coercive effect of the question and I find that it constitutes unlawful interrogation in violation of Section 8(a)(1) of the Act, as alleged.

As noted, several other employees received warnings shortly after the January 24 demand for recognition and Jones' caustic letter of January 27. These include warnings to Linda Joy as well as Howell and Richie. Although Respondent gave some explanation for the warnings, because of the timing of these warning (Howell's was 2 months after this event), I am not persuaded that the Respondent would have resorted to formal warnings were it not for Administrator Jones' strong reaction (which apparently arose after she consulted with Respondent's attorney or board of directors), and I conclude that these warnings were designed to interfere with the employees' newly expressed demand for the right to bargain collectively.

Within a day or so after January 24, the Respondent changed the locks on the doors to the main offices, the pay telephone was removed and unlimited access to the copier by the nurses was eliminated because of the change in locks. Although Jones testified that the phone was removed because of a renovation, Respondent did not contact Ohio Bell until March or April to replace the phone and Jones acknowledged that they then placed the phone on a wall that was not part of the renovation. Respondent also prohibited employees from wearing pins (they previously had worn pins such as those for the Special Olympics), changed its policy in distributing checks whereby employees who worked the afternoon and evening shifts were no longer allowed to receive their checks early, and it also discontinued its policy of allowing employees to receive cash advances on their checks (which allowed employees to receive advances for hours already worked 2 to 4 days early). Under all these circumstances, I infer that such actions were in retaliation for the union activities engaged in by the employees.

On April 4, the LPN nurses received a clarification of policies for the way in which they received overtime pay. Prior to this time they received overtime pay for all hours worked beyond their scheduled 36 hours. Under the clarification they received overtime pay only after they worked 40 hours. Their calloff procedures were also changed to require each nurse to find her own replacement. In the past, the nurse on duty or the director of nursing would find a replacement. Also, they were no longer permitted to use personal days at their own discretion and were required to provide doctor's excuses if they missed 1 day. In the past, they, as other staff members, only had to provide a doctor's excuse after a 3-day absence. Fithian testified that the direct care staff only had to provide a doctor's excuse upon returning to work if they missed more than 2 days, and that this had always been the policy, yet Respondent only changed the policy to effect LPNs, persons medically trained and in the best position to self-evaluate the need for a medical absence.

In February, Supervisor Buckley told the cooks that those who refused to come in when called on a day off would have a note placed in their file, a practice not previously followed.

These actions, as well as Respondent's changing the hours of certain employees and changing its policy regarding when ''in service'' memos should be signed are shown by the General Counsel to have been done in an apparent spirit of retaliation and otherwise are shown to have occurred without serious justification at a time that closely links their occurrence with the Respondent's policy and practice of avoiding communication with the Union and the employees. These actions are therefore strongly coercive in nature and reasonably tended to interfere with the employees' Section 7, rights, and they occurred at a time when the possibility of holding a union election was pending and a time when the Respondent had rejected its obligation to bargain with the Union that had been recognized by its administrator. Accordingly, in each such instance set forth above, I find that the General Counsel has shown that the Respondent violated Section 8(a)(1) of the Act, as alleged.

Although the complaint alleges certain instances of employee surveillance on the part of the Respondent (Jones drove by Milhoan's home when employees were having a meeting and Fithian took notes when employees were wearing or getting union T-shirts), each had an explanation for the actions and the General Counsel's evidence is too conjectural to prove a violation of the Act in these instances. Milhoan, however, credibly testified regarding circumstances in which Supervisor Fristic was reported to have been listening at a door behind which Milhoan and Howell were talking, an action which resulted in a memo from Manning prohibiting the closing of the nurses' station door and I find that

this constitutes surveillance in violation of Section 8(a)(1) of the Act, as alleged.

H. *Unilateral Changes in Terms and Conditions of Employment*

As discussed above in section A, the Respondent became obligated to bargain with the Union on January 24, upon its recognition of the Union as the representative of its employees. Moreover, even though it ultimately acknowledge a recognition of the Union on October 12, Union Representative Timko credibly testified that prior to a first bargaining meeting in December 1992, the Respondent discussed none of the modifications or changes that it had made since January 1992 with the Union. Byers, who is on the negotiating committee and who has attended all the negotiations, also confirmed that none of the unilateral changes alleged in the charges were ever discussed in negotiations and Fithian admitted that he had never talked to the Union about any of the changes he made and Jones also admitted that the changes that were made were never discussed with the Union prior to October 1992.

The section immediately above sets forth numerous changes in terms and conditions of employment that interfered with employee rights. These changes were appropriate subjects for bargaining that the Respondent never bargained over with the Union and I find that its failure to do so was a violation of Section 8(a)(1) and (5) of the Act, as alleged.

The record shows that Brad Martin, the maintenance representative on the bargaining committee, had his pay cut from $9.25 to $7.35. Inasmuch as he supervised no employees and he was stipulated to be in the unit, he is an employee within the meaning of the Act. The reduction of his pay was unilateral and was not subjected to bargaining and I find that it is shown to be a violation of Section 8(a)(1) and (5) of the Act, as alleged.

In addition to the changes involving Tharp, discussed above, the record also shows that cook Bilsky (who retired in September and was a regular part-time employee every other weekend and also was a vacation replacement) was subjected to unilateral reduction in days worked. She never was told or asked about any change but went in and saw that a man was on the schedule for one of her regular days in August. Buckley, her supervisor, admitted that she had reduced Bilsky's hours and also testified that she never bargained with the Union over this. Buckley also admitted that she dealt directly with her entire staff (and not the Union), in September 1992 when she sought their opinion on altering their hours. The latter action is, as alleged by the General Counsel, a separate violation of the Act and, accordingly, I find that the General Counsel has shown the Respondent has engaged in direct dealing with employees and otherwise has unilaterally changed terms and conditions of employment without bargaining with the Union, all in violation of Section 8(a)(5) of the Act, as alleged.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union, Service Employees International Union, Local 627, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act and the following employees of Respondent, the unit, have, since January 24, 1992, constituted a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time licensed practical nurses, habilitation, activity, therapy, and psyche aides, dietary, social service, housekeeping and maintenance employees and seamstresses employed at the employer's Lisbon, Ohio facility, but excluding the administrator, program director, director of nursing, dietary manager, social services director, registered nurses and all professional employees, guards and supervisors as defined in the Act.

3. On January 24, 1992, Administrator Mary Jane Jones, for the Respondent, recognized the Union as the employees' collective-bargaining agent.

4. Subsequent to January 27, 1992, the Respondent unilaterally withdrew recognition and thereafter failed and refused to recognize and bargain collectively with the Union until October 12, 1992, and thereby violated Section 8(a)(1) and (5) of the Act.

5. By unilaterally implementing changes in terms and conditions of employment after January 24, 1992, including disocntinuing its early check distribution policy; removing the pay telephone; discontinuing nurses' access to the copy machine; changing the starting times and hours of work for various employees; changing its policy regarding signing ''in-service'' memos; maintaining lists of employees who declined to work as fill-ins; discontinuing its cash advance policy; prohibiting employees from wearing pins; requiring nurses (LPNs) to find their own replacements; requiring nurses to provide a doctor's excuse for any absence; changing its practice regarding overtime pay for nurses; creating and thereafter failing to post the position of habilitation specialist; reducing the hourly rate of pay for Brad Martin; eliminating the position of physical therapy aide occupied by John Tharp, and changing the hours of cook Eleanor Bilsky, while failing to notify the Union or bargain over these changes, Respondent has interfered with employees' Section 7 rights, and discriminated against employees because of their selection of the Union as their collective-bargaining representative, and thereby violated Section 8(a)(1), (3), and (5) of the Act.

6. By threatening to enforce policy and work rules, engaging in unlawful surveillance, interrogating employees, threatening employeees with discharge because and/or if they engaged in union or protected concerted activities, Respondent violated Section 8(a)(1) and (3) of the Act.

7. By suspending Kathy Byers, Lorena Howell, Gayle Milhoan, and Carol Redmond on May 18 and thereafter terminating them on June 12, 1992, because of their union or protected concerted activities, Respondent violated Section 8(a)(1) and (3) of the Act.

8. By terminating the employment of Blaine Ritchie on May 28, 1992, Respondent violated Section 8(a)(1) and (3) of the Act.

9. By suspending on May 29, 1992, and thereafter terminating the employment of Donna Yeager on June 10, 1992, Respondent violated Section 8(a)(1) and (3) of the Act.

10. By issuing disciplinary warnings to employees Lorena Howell, Linda K. Joy, and Blaine Ritchie, Respondent violated Section 8(a)(1) and (3) of the Act.

11. By engaging in harassment directed at Gayle Milhoan after her return to work in October 1992, Respondent violated Section 8(a)(1), (3), and (4) of the Act.

12. The Respondent otherwise is not shown to have engaged in conduct violative of the Act as alleged in the complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

With respect to the necessary affirmative actions, it is recommended that Respondent be ordered to offer Kathy Byers, Carol Redmond, Blaine Ritchie, and Jim Tharp reinstatement to their former jobs or substantially equivalent positions, dismissing, if necessary, any temporary employees or employees hired subsequently, without prejudice to their seniority or other rights and privilieges previously enjoyed, and make them as well as Eleanor Bilsky, Brad Martin, Gayle Milhoan, Lorena Howell, and Donna Yeager whole for any loss of earnings they may have suffered because of the discrimination practiced against them by payment to them of a sum of money equal to that which they normally would have earned from the date of the discrimination to the date of reinstatement in accordance with the method set forth in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[4]

The Respondent also shall be ordered to expunge from its files any reference to the suspensions, terminations and illegal warnings given and notify the employees in writing that this has been done and that evidence of the unlawful warning will not be used as a basis for future personnel action against them.

Respondent also shall be ordered to bargain in good faith with the Union for the period required by *Mar-Jac Poultry Co*., 136 NLRB 785 (1962), to ensure that the Union and the employees derive the benefit of the Union's 9(a) status under the Act.

Having found that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally withdrawing recognition and thereafter failing and refusing to recognize and bargain and by failing to bargain in good faith by unilaterally implementing changes in terms and conditions of employment, it is recommended that on request of the Union, Respondent be ordered to rescind all or part of any implemented changes and to bargain in good faith with the Union as the exclusive bargaining agent of the above appropriate unit of its employees with respect to their wages, hours, and other terms and conditions of employment and embody any understanding reached in a signed agreement.

Otherwise, it is not considered to be necessary that a broad order be issued.

[4] Under *New Horizons*, interest is computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Opportunity Homes, Inc., Lisbon, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interfering with, restraining, or coercing its employees in the exercise of rights guaranteed in Section 7 of the Act by interrogating an employee about union support or union activities, by creating the impression employees' union activities are under surveillance, by threatening to enforce policy and work rules and threatening unspecified reprisal or discharge because of or if employees engaged in union or protected concerted activities.

(b) Interfering with, restraining, or coercing its employees, discriminating against employees because they joined or supported a union or unilaterally and without bargaining effecting changes in terms and conditions of employment by discontinuing its early check distribution policy; removing the pay telephone; discontinuing nurses' access to the copy machine; changing the starting times and hours or work for some employees; changing its policy regarding signing ''in-service'' memos; maintaining list of employees who declined to work as fill-ins; discontinuing its cash advance policy; prohibiting employees from wearing pins; requiring nurses (LPNs) to find their own replacements; requiring nurses to provide a doctor's excuse for any absence; changing its practice regarding overtime pay for nurses; creating and thereafter failing to post the position of habilitation specialist; reducing the hourly rate of pay; and eliminating the position of physical therapy aide.

(c) Suspending, terminating, or issuing disciplinary warnings harassing, or otherwise discriminating against any employee because of or in retaliation for their engaging in union activities or other protected concerted activity.

(d) Unilaterally withdrawing recognition of Service Employees International Union, Local 627, AFL–CIO and failing and refusing to recognize and bargain in good faith with the Union as the exclusive bargaining agent of its employees in the following appropriate unit:

> All full-time and regular part-time licensed practical nurses, habilitation, activity, therapy, and psyche aides, dietary, social service, housekeeping and maintenance employees, and seamstresses employed at the Employer's Lisbon, Ohio facility, but excluding the administrator, program director, director of nursing, dietary manager, social services director, registered nurses and all professional employees, guards and supervisors as defined in the Act.

(e) Unilaterally implementing changed in terms and conditions of employment without first notifying or bargaining in good faith with the Union.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusion, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them be deemed waived for all purposes.

(f) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action neccessary to effectuate the policies of the Act.

(a) Offer Kathy Byers, Carol Redmond, Blaine Ritchie, and Jim Tharp immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them, as well as Eleanor Bilsky, Brad Martin, Gayle Milhoan, Lorena Howell, and Donna Yeager whole for the losses they incurred as a result of the discrimination against them in the manner specified in the remedy section of this decision.

(b) Expunge from its files any reference to the warnings, suspensions, and discharges of these employees as well as Linda Joy and notify them in writing that this has been done and that evidence of the unlawful discharge and warning will not be used as a basis for future personnel actions against them.

(c) On request, rescind all or part of the unilaterally made changes in terms and conditions of employment and retroactively restore preexisting terms and conditions of employment and, on request, bargain in good faith with the Union as the exclusive bargaining agent of the above appropriate unit of its employees with respect to their wages, hours, and other terms and conditions of employment and embody any understanding reached in a signed agreement.

(d) Preserve and, upon request, make available to the Board or its agents for examination and copying, all records, reports, and other documents necessary to analyze the amount of backpay due under the terms of this decision.

(e) Post at its Lisbon, Ohio facility copies of the attached notice marked ''Appendix.''[6] Copies of the notice, of forms provided by the Regional Director for Region 8, after being signed by Respondent's authorized representative shall be posted by Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

---

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''